Supreme Court, U.S.
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No. 95-1595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

BRUCE BABBITT, Secretary of the Interior, et al.,
Petitioners

v.

MARVIN K. YOUPEE, SR., et al.,
Respondents

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

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WASHINGTON, D.C. 20543

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C 2206, violates the Fifth Amendment because it does not provide for compensation to the estate of the decedent for the land it declares to escheat.

PARTIES TO THE PROCEEDINGS BELOW

In the courts below the defendant/appellant was the Secretary of the Interior. The plaintiffs/appellees were Marvin K. Youpee, Sr., Cary G. Youpee, Darlan D. Youpee, Allen F. Youpee, Helen Youpee-Ricker, and Williamette Y. Bussard.

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2201-2210.

STATEMENT OF THE CASE

The first two paragraphs of the Petitioner's Statement present an adequate history of the Indian Land Consolidation Act (ILCA) up through this Court's decision in *Hodel v. Irving*, 481 U.S. 704 (1987).

The decedent, William Youpee, died testate on October 19, 1990. He was an enrolled member of the Fort Peck Tribes and owned undivided fractional interests in allotted trust land on Fort Peck, Standing Rock and Devils Lake Sioux Reservations. Thirty-four (34) of the land and mineral parcels that he devised to his children escheated under amended Section 207. The devisee of these parcels were Marvin K. Youpee, Sr.; Cary G. Youpee; Darlan D. Youpee; Allen F. Youpee; Helen Youpee-Ricker and Williamette Y. Bussard.

All the devisee filed suit on February 3, 1993, in the United States District Court for the District of Montana against the Secretary of the Interior alleging that

the ILCA, as amended, violates the Just Compensation Clause of the Fifth Amendment to the United States Constitution. C.A. Excerpts or Record (E.R.) 3-4. These plaintiffs also argued that the Department of the Interior as trustee for the decedent had failed to advise him that his land as devised would escheat to tribes. E.R. 5. The court held that the ILCA as amended violates the Just Compensation Clause for those property owners who are not legally capable of devising property or who do not have an heir who possesses an undivided interest in the escheatable property. App. Pet. 23a.

The court of appeals affirmed, holding that amended ILCA restricts devise and descent of land by Indian landowners who do not have an heir who owns a share in the parcel and that the statute continues to completely abolish one of the sticks in the bundle of rights for a class of Indian landowners. In addition, the court held that amended Section 207 is an extraordinary and impermissible regulation of Indian lands and effects an unconstitutional taking without just compensation.

REASONS FOR DENYING THE WRIT

I. THERE IS NO DISAGREEMENT AMONG THE UNITED STATES COURTS OF APPEALS ON THE QUESTION AT ISSUE IN THIS CASE.

The rules of this Court defining the limits of this Court's jurisdiction over decisions of the United States courts of appeals does not lend support to petitioner's request that this Court invoke its discretionary jurisdiction to review the opinion below. Rule 10 of the Rules of the Supreme Court of the United States recites as a reason for granting a writ of certiorari,

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

Two United States Courts of Appeals have considered whether amended Section 207 is constitutional. Both the Ninth Circuit Court of Appeals here and the Eighth Circuit Court of Appeals have concluded that amended Section 207 is unconstitutional.

The United States Court of Appeals for the Eighth Circuit in *Irving v. Clark*, 758 F.2d 1260 (1985) overruled the lower court and held that the escheat provisions of the Amended Indian Land Consolidation Act constitute a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. Although that conclusion was

declared dicta by this Court in a footnote in *Hodel v. Irving*, 481 U.S. at 710, n.1, the holding of the Court of Appeals remains good law. It cannot be said that a case is not authority on a point because, although that point was properly presented and decided, something else in the end was found which disposed of the whole matter. *Florida C.R. Co. v. Schutte*, 103 U.S. 118 (1881).

Petitioner cites to *Klauser v. Babbitt*, 95-C-193-C, 1996 WL 96637 (W.D. Wis. March 1, 1996), as a recent lower court decision that has held that amended Section 207 is constitutional. Petitioner speculates that because of this ruling, there is a substantial national uncertainty regarding the validity and operation of the Act. *Klauser* has been appealed to the Seventh Circuit court of appeals and any court of appeals that has heard this issue has ruled that the amendments are unconstitutional. Two things can happen on appeal in *Klauser*. The Seventh Circuit could follow the Ninth Circuit. If so, there would be no split in the circuits and the needed uniformity in the law will have been achieved without the need for action by this Court. The other scenario would be that the Seventh Circuit would uphold the constitutionality of ILCA. If that were to happen, then it would be appropriate at that time to grant certiorari in that case. This Court would then have advantage of the divergent views of two different circuits.

At the current time, there is no substantial uncertainty within any circuit (Eighth and Ninth Circuits) that has dealt with this issue. This Court should wait and have the advantage of the judicial analysis of other circuit courts should those circuit courts ever be in conflict on the constitutionality of the amendments.

II. THE CIRCUIT COURT OPINION IS CORRECT.

The Ninth Circuit correctly lays out the effects of the amended act. The effects are threefold: first, the right to descent is completely abolished for all, second, the right to descent and devise is abolished for an entire class of Indian landowners; and third, the right to descent and devise is de facto abolished for all because the practical outcome of forcing decedents to choose between leaving to collateral heirs or strangers "...produces the same evil as the original; certain Indian landowners are prohibited from conveying the land by both descent and devise." *Youpee v. Babbitt*, 67 F.3d 194, 198 (9th Cir. 1995)

After considering these effects, the Court correctly applies the three part *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) analysis to determine that the effects of the amended act result in an unconstitutional taking. The interest taken is one's right to devise 2% land which under the amended act escheats to the tribe.

The Court appropriately conditions the disposition of the case upon the *Penn Central* analysis because it correctly assumes that the Indian decedent's right to devise his allotted land and the right to have it descent is a vested one. Once such an assumption is made, the Court must conclude that a taking results when these rights are foreclosed by a Congressional act; that is, the amended act.

In this case the decedent's right to devise is grounded in the various treaties and agreements which set the boundaries of the Fork Peck Reservation. It is also

found in the General Allotment Act which provided that land would be held in trust for the allottee **or his heirs.**[1].

To obtain these allotments, allottee had to relinquish any rights they had to their common interest in Tribal land. The lands allotted and the right of the heirs to that land as consideration for the relinquishment of lands held in common. *Choate v. Trapp*, 224 U.S. 665 (1911).

Congress expressly granted allottees the right to devise. Specifically, Congress provided that allottees

> ...shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, ... 25 U.S.C. 373.

While some may argue that Congress by the amended act can abrogate this right, such arguments

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[1]The allotment acts promise the right of descent and devise. Section 25 U.S.C. 348 provides that the

> "... Secretary of the Interior shall cause patents to issue therefor in the name of the allottee, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty five years, in trust for the sole use and benefits of the Indian to whom such allotment shall have been made, or, in the case of his decease, of **his heirs** according to the laws of the State or Territory where such land is located..." [emphasis added]

would be misplaced. They are misplaced because it has only been held that Congress may reallocate tribal lands, *Gritts v. Fisher*, 224 U.S. 640 (1912), *United States v. Jim*, 409 U.S. 80, reh.denied, 409 U.S. 649 (1976), *Northern Cheyenne v. Hollowbreast*, 4425 U.S. 665 (1976), but it may not reallocate individual land, *See e.g. Choate v. Trapp, supra*, without triggering the fifth amendment. Id.

The Ninth Circuit's result using the *Penn Central* analysis is correct. First, the Court decided that the amended act's provisions did not ensure that income generated by a parcel was but one component of the parcel's value.[2] It correctly concluded, as this Court did in *Hodel*, that a parcel's fair market value, if sold, is the appropriated measure.[3] *Youpee*, 67 F.3d at 199 citing *Hodel v. Irving*, 481 U.S. at 715.

Next, the Court correctly decide that changes to the original version of the act which permit devise to any other owner of an undivided interest in the parcel does not cure the taking problems. This is a correct conclusion because the amended version allows devise only to those who have an heir who owns a share in the parcel. Descent by intestacy rules remains improper, and an entire class of Indian decedents who are under twenty-one are foreclosed from devising their 2% interests or

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[2]The amended act looks back five years. If the land generates income in excess of $100.00 in any of those years, it may not escheat. 25 U.S.C. §2206(a).

[3]The record indicates that in this case the value of the escheated land amounts to $2,100.00 ER at 4.

allowing them to descend.

Appellants see it differently, They point to O'Connor's dicta in *Hodel* and attribute support for the amended statute's constitutionality to her remarks and suggestions. 481 U.S. at 718. The Ninth Circuit correctly disposes of this argument after it rightfully concluded that the amended statute does not follow Justice O'Connor's suggestions.

O'Connor's suggestions imply that a revamped stature which abolishes descent by rules of intestacy may be constitutional. 481 U.S. 704 at 718. Such a prohibition, she speculates, would force owners to formally designate an heir. Id. Thus, a Constitutional taking is avoided because the testator's right to devise remains intact. The 9th Circuit correctly observes that the amended statute does not, as Justice O'Connor's dicta suggests, allow the "....decedent to choose a devisee from the population,...[it]...restricts the population to a very limited group, which is unlikely to contain any lineal descendants, and requires the decedent to choose a devisee from this group." *Youpee*, 67 F.3d at 199. Thus ones right to devise is effectively eliminated.

III. THIS CASE IS PROCEDURALLY FLAWED.

First, Rule 14 of the Rules of the Supreme Court of the United States requires that a petition for a writ of certiorari shall contain:

> (b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed...

The petitioner has failed to list as parties two of the plaintiffs/appellees in the courts below. Darlan D. Youpee and Williamette Bussard were plaintiffs in the district court proceeding. E.R. 3, 45. Darlan D. Youpee and Williamette Youpee were appellees in the case below. App. Pet. 1a. The petitioner now does not name Darlan D. Youpee and Williamette Youpee as parties over whom the petitioner seeks review in this Court. At page II of the petition and at paragraph 3, page 5 of the petition, the petitioner does not name D.Dwight Youpee and Williamette as parties. In addition, at note 2 on page 7, the petitioner states that Darlan D. Youpee and Williamette Youpee had escheatable interests but did not join in this suit.

All the persons with escheatable interests from the decedent have always been a party to this suit. In fact, Darlan D. Youpee was willed 20 land and mineral parcels and Williamette Youpee was willed 5 land and mineral parcels. E.R. 22-25, 30, 34, 40-44. By not including Darlan D. Youpee and Williamette Youpee as parties, the petitioner seeks to portray the land and mineral interests involved as de minimis.

However, the greatest impact here is, that because Darlan D. Youpee and Williamette are not named as respondents, this Court is not vested with jurisdiction over them. As such, Darlan D. Youpee and Williamette Youpee are vested with a final judgment from the Ninth Circuit that is not reviewable. *International Union v. Scofield*, 382 U.S. 205 (1965).

A court of review does not have jurisdiction over a party who was not specified in the notice of appeal. *Torres v. Oakland Scavenger Company, et al.*, 487 US

312, reh den U.S. (1988). In *Torres*, a secretary had inadvertently omitted Torres' name from the list of 16 appellants on the notice of appeal. In finding that the review court was without jurisdiction, this Court dismissed arguments that the omission was an informality of form or title as well as the argument that good cause shown should suspend the requirements of the rules or that "et al." in the notice was sufficient to notify the respondent and the court that petitioner was an appellant. Failure to join all appellees should result in dismissal of the petition. *Hartford Acci. & Indem. Co. v. Bunn*, 285 U.S. 169 (1932); *Davenport v. Fletcher*, 57 U.S.(16 How.) 142 (1854).

Second, the petitioner raises for the first time in this petition a number of new facts not contained in the record. The petitioner now states that a large number of estates with escheatable interests have been probated under the amended Act within the Ninth Circuit. Pet. at 16. Also, the petitioner now states that "we" have been informed by the Department of Interior that a portion of the amended version of Section 207 has been implemented. Pet. 12 n 4. These factors cannot now be presented to the Court for the first time. *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157 (1950).

Third, the Petitioner also incorrectly states that the estimated value of the escheated interests here ranged from $18.33 to $244.44. Pet.16. Had the Petitioner properly included Darlan D. Youpee as a party, he would have to state that Darlan D. Youpee, alone, had 25 parcels devised that escheated, some of which were valued as high as $305.56, $309.75 and $333.33. E.R.

30,40-44.

Fourth, the petitioner never developed the record to answer the respondents' statements within their pleadings (E.R. 4-5) of lack of due process for the decedent. Due process is as integral an element as the actual taking when considering the guarantees of the Fifth Amendment. The factors and elements of due process must be considered by this Court but the petitioner has not developed the record enough for such consideration.

In that the petitioner (1) has failed to name essential parties, (2) seeks now to supplement the record with new facts, (3) incorrectly states the record as to the value of devised parcels and (4) has failed to complete the record as to due process given the decedent, this case is too procedurally flawed to be effectively considered by this Court at this time.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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